IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.992 OF 2006
Along with
CIVIL APPLICATION NO.1300 OF 2006

Rajaram Pawar and Anr. .. Appellants.
Vs
Ramchandra Pawar & ors. .. Respondents.

Mr P.M.Arjunwadkar, for the appellants.
Mr P.D.Dalvi, for respondent nos 1 to 5.

CORAM : D.B.BHOSALE,J.
DATE : 16.11.2006

PC:

1. Heard the learned counsel for the parties.

2. The findings of fact recorded by the courts below are under challenged in the instant second appeal. The learned counsel for the appellants, submitted that ground no.12 is the substantial question of law involved in the present appeal. Ground no.12 reads thus :-

> "12. Whether the learned Judge was justified in observing that to claim the right of way by easementary right of necessity, the appellants ought to have pleaded and proved that CTS nos 9621 and 9622 were earlier jointly owned by the appellants or their ancestors and later on they were partitioned. The learned Judge ought to have referred the documentary evidence namely property register card of CTS nos 9621 and 9622 which stands in the name of respondents and appellants respectively. This fact itself reveals that both the properties are separately owned by the appellants and respondents and therefore there is no necessity to plead and

> prove the fact about the earlier joint ownership of appellants and respondents. Whether the learned Judge was further justified in ignoring the admission of Ramcahndra that CTS no.9622 and 9621 were inherited by fathers of the appellants and respondents respectively. This admission itself is self-reliant to hold that there was severance of these two city survey numbers, and hence it need not be pleaded and proved separately. The learned Judge erroneously interpreted the provisions of Sections 27 and 28 of Indian Easement Act."

3. I perused the judgments of the courts below. It appears that the appellants were not clear/sure as to whether they have easementary right of way by prescription or it is an easement of necessity. The appeal court in paragraphs 10 and 11 has considered the defendants easementary right of way by prescription in the light of provisions of section 15 of the Indian Easements Act and has rejected the said contention. In paragraph 12, an easement of necessity has also been considered in the light of the provisions of section 13 of the Easement Act. However, before this court the learned counsel for the appellants submitted that the appellants' right of way is under easement of necessity. He invited my attention to the map annexed to the plaint, the evidence of witnesses, as also the averments in the plaint and in the light of the provisions contained in section 13 of the Easements Act, contended that except the disputed way, the appellants do not have any other access to approach the government lane on the

northern side of city survey nos 9622 and 9621. The city survey no.9622 is the property of the appellants-plaintiffs while 9621 is of the respondents-defendants. The disputed way passes through city survey no. 9621 . The appeal court, however, after considering the entire material placed on record and reappreciating the evidence, has held that reasonable enjoyment of the appellants property is possible without the disputed right of way. Section 13 provides for six different situations which may arrive where one person transfers or bequeaths immovable property. These six situations are covered by sub-sections (a) to (f). Sub- sections (a) and (b) deal with the effect on transferee’s right; sub-sections (c) and (d) deal with the effect on the transferor’s right, while sections (e) and (f) deal with the of the parties to a partition. These are called "easements of necessity" and they apply where the dominant property cannot be used at all unless the easement exists. It is an easement which is not merely necessary for the reasonable enjoyment of the dominant property, but are without which that property cannot be used/enjoyed at all. This exactly what the appellants, in our case, have failed to establish. The trial Court had decreed the suit mainly relying upon the report of the court commissioner and the evidence of the court commissioner

Sadashiv Patil (PW 2). The Appeal Court, in paragraph 13 of the judgment, has considered the evidence of the court commissioner and has discarded the same for the reasons recorded therein. In my opinion, no substantial question is involved in this appeal. Keeping that in view and considering the concurrent findings of fact and as I find that there is sufficient material on record to sustain those findings and considering the extremely limited jurisdiction of this Court under section 100 of C.P.C to disturb the findings of fact, this appeal along with the civil application fails and is dismissed as such.

(D.B.BHOSALE,J.)